No. 15908

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

ISADORE SMITH,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLEE'S BRIEF.

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TOPICAL INDEX

TABLE OF AUTHORITIES CITED

Cases

Rules

Statutes

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APPELLEE'S BRIEF.

I.
JURISDICTIONAL STATEMENT.

The jurisdiction of the District Court is founded upon Section 3231, Title 18, United States Code. The petition to vacate the original judgment was made by appellant under Section 2255, Title 28, United States Code. The jurisdiction of the Court of Appeals to entertain this matter may be found under the provisions of Section 1291, Title 28, United States Code, and Rules 37 and 39 of the Federal Rules of Criminal Procedure.

II.
STATEMENT OF THE CASE.

On July 12, 1956, Appellant was found guilty in the United States District Court, Southern District of California, Southern Division on all counts of an indictment charging violations of Title 18, United States Code, Section 545, and Title 26, United States Code, Section 4755. On July 26, 1956, the Honorable James M. Carter, District Judge before whom the case was tried, sentenced Appellant to a term of five years on Count One of the Indictment and imposed a fine of $5,000.00. On Count Two of the Indictment Appellant was sentenced to a term of five years to run consecutively to the sentence on Count One and fined $1.00. On Count Three of the Indictment Appellant was sentenced to a term of five years and fined $1.00, said five year term to run concurrently with the sentence imposed on Count Two. On September 4, 1956, pursuant to a motion by Appellant the judgment was modified in that the execution of sentence on Count Three only was suspended and the defendant placed on probation for a period of five years to commence upon completion of the sentences imposed on Counts One and Two. A Notice of Appeal was filed; however, this appeal was dismissed by this Honorable Court on April 23, 1957 for non filing of the record.

On October 7, 1957, Appellant filed a Motion to Set Aside and Vacate the Sentence Under Title 28, United States Code, Section 2255 on the ground that he was insane at the time of arraignment, trial and sentence [Clk. Tr. p. 99].

On October 25, 1957, a memorandum was filed and endorsed by the District Court denying the Motion to Vacate

[Clk. Tr. p. 111]. A Notice of Appeal from this decision was filed by Appellant on November 26, 1957 [Clk. Tr. p. 115] and an Application for Leave to Proceed in *Forma Pauperis* [Clk. Tr. p. 116]. On December 6, 1957, the District Court filed and endorsed an Order and Certificate of Lack of Good Faith [Clk. Tr. p. 118]. A Motion to Review the Order of the District Court was received by Appellee on December 22, 1957. On January 20, 1958, an Order of this Honorable Court Granting Appellant's Prayer to Proceed in *Forma Pauperis* was filed and endorsed. Said order directed that counsel be appointed to represent Appellant. However, Mr. Smith elected to proceed in *propria persona.* On April 1, 1958, Appellee received a motion filed in this Honorable Court "To Dismiss Conviction and Sentence" and on April 9, 1958, Appellee received a brief filed by Mr. Smith in his own behalf urging that the District Court erred in concluding that he was sane at the time of trial. Thereafter a number of motions were filed by Mr. Smith which are not pertinent to the issue now pending.

III.
SPECIFICATION OF ERROR.

Appellant sets forth a number of "questions presented" in his brief (Appellant's Br. p. 2). The instant appeal, however, presents only one simple issue to this Honorable Court:

DID THE DISTRICT COURT ERR IN DENYING WITHOUT A HEARING APPELLANT'S MOTION TO VACATE HIS SENTENCE ON THE GROUND THAT HE WAS INSANE AT THE TIME OF TRIAL?

IV.
ARGUMENT.

A. Mental Impairment Must Be of an Extreme Degree Before It Renders a Person Unamenable to Trial.

The Government concedes that a motion under Title 28, U. S. C., Section 2255 is an appropriate method for a prisoner to challenge his confinement on the ground that he was insane at the time of trial.

Joseph Orby Smith v. United States, ... F. 2d..... (9th Cir., 1958, decided July 7, 1958);

Bishop v. United States, 350 U. S. 961 (1956), vacating 223 F. 2d 582.

Furthermore, in order to justify denying such a motion without a hearing "the files and records of the case [must] conclusively show that the prisoner is entitled to no relief, * * *."

28 U. S. C., Sec. 2255;

Garcia v. United States, 197 F. 2d 687.

For a proper consideration of the issue now pending before this Honorable Court, it is important to have clearly in mind the standard envolved. We are not here concerned with appellant's "responsibility" that is, his ability at the time of the commission of the offense to distinguish right from wrong and adhere to the right. The present appeal envolves only Mr. Smith's mental state at the time he was arraigned, tried, and sentenced. The test, therefore, in this inquiry is whether appellant understood the

nature of the proceedings against him and was able properly to assist in his own defense.

18 U. S. C., Sec. 4244;

Gunther v. United States, 215 F. 2d 493, 496 (C. A. D. C., 1954);

Higgins v. McGrath, 98 Fed. Supp. 670, 673 (U. S. D. C. W. D. Mo. 1951) subsequently considered by the 9th Circuit on a related matter in *Higgins v. Binns,* 205 F. 2d 650 (9th Cir., 1953);

United States v. Smith, 131 Fed. Supp. 88, 94-95 (U. S. D. C. Vt., 1955);

United States v. Gundelfinger, 93 Fed. Supp. 630, 631 (U. S. D. C. W. D. Pa., 1951).

Stated in the converse, before a man is considered unamenable to trial, it must appear that his mental faculties are so far impaired that he is either unable to comprehend the nature of the proceedings against him, or is unable properly to aid in his own defense. It is obvious that the degree of mental impairment must be extreme before such a result follows. In the light of this standard it is patently clear that the ruling of the Honorable James M. Carter on appellant's motion under Section 2255 was entirely correct.

B. Only Part of the Matters Now Urged by Appellant Before This Honorable Court Were Presented to the District Court.

An examination of Judge Carter's memorandum in which appellant's motion was denied [Clk. Tr. p. 111] reflects that the denial does not specifically set forth that the action was taken on the basis of the entire "files and records." However, a reading of the memorandum dem-

onstrates that the "files and records" were, in fact, the basis for Judge Carter's ruling, and the memorandum is tantamount to an explicit recital that the action taken therein was based on the "files and records."

Adams v. United States, 222 F. 2d 45 (C. A. D. C. 1955);

See:

Garcia v. United States, supra.

It is well established that the Court of Appeals will not address itself to matters which have not been presented to the District Court in determining whether or not the action taken in that forum was correct.

Seals v. Johnson, 95 F. 2d 501 (9th Cir., 1938);

Garrison v. Johnson, 104 F. 2d 128, 129-130 (9th Cir., 1939), cert. denied 308 U. S. 553; rehearing denied 308 U. S. 636;

Davis v. Johnson, 144 F. 2d 859 (9th Cir., 1944).

At the time appellant first made his motion in the District Court he urged, as one basis for his motion, his past history with the Veterans Administration namely, that he had been discharged from the Naval Service in 1945 on the ground that he was 50% disabled because of a mental condition; had been under the care of a Veterans Administration psychiatrist; at one time was found 100% disabled, and at the time of trial was considered 80% mentally disabled by the Veterans Administration [Clk. Tr. p. 102]. It further appears that the District Court was necessarily apprised of the fact appellant was confined in the Federal Hospital at Springfield, Missouri [Clk. Tr. p. 102]. In his motion before the District Court, Smith also alleged that a timely motion for a psychiatric examination had been made by his counsel

[Clk. Tr. p. 105]. However, this assertion is not supported by the record, and the only occasion on which counsel for Smith mentioned the latter's medical history was at the time of sentence [Rep. Tr. pp. 584-586]. At that time Mr. Curzon, appellant's counsel, advised the Court that appellant was sane [Rep. Tr. p. 586].

In the points urged before this Honorable Court, appellant has enlarged upon the matters explicitly mentioned by his motion in the trial forum. He points out that affidavits in support of the issuance of subpoenas on behalf of an indigent defendant indicate that a doctor from the Veterans Administration was desired as a witness by the defendant [Clk. Tr. pp. 15, 16]. Furthermore, appellant points out that the record contains an affidavit by his wife submitted pursuant to a motion for reduction of sentence in which it was alleged by the wife that she did not think appellant had a "real capacity to understand the criminal nature of his acts." [Clk. Tr. pp. 90-91]. Although these particular items were not specifically brought to the attention of the Court by appellant's motion, the Government concedes that they may be considered by this Honorable Court in determining whether Judge Carter's ruling was correct, since the matters are obviously part of the files and records of this cause.

With respect to the other points urged before this Honorable Court by appellant as a basis for reversing Judge Carter's ruling, it is respectfully submitted that since the matters were not presented in the trial forum, they must be disregarded in determining whether or not Judge Carter's ruling was correct.

Seals v. Johnson, supra;

Garrison v. Johnson, supra;

Davis v. Johnson, supra.

The Government is now referring to appellant's allegation that he was found insane by the Veterans Administration (p. 1, Memorandum of Points and Authorities in Support of Motion to Review District Court's Certificate), and appellant's allegations with respect to his disposition and evaluation upon being received at the Federal Penitentiary, McNeil Island, Washington (p. 2 of Memorandum, *supra;* p. 3, Motion to Dismiss Conviction; and p. 17, Appellant's Br.); likewise the affidavit of appellant's wife attached to his brief as Exhibit B must be disregarded.

C. The District Court Properly Concluded That Appellant's Showing Was Insufficient to Require a Hearing Under 28 U. S. C., Section 2255.

It is submitted that matters which may properly be considered in support of appellant's petition are completely outweighed by an examination of his testimony at the time of trial [Rep. Tr. pp. 326-346, 383-428, 511-513] and the proceedings at the time of sentence [Rep. Tr. pp. 580-589]. Appellant's examination under oath indicates beyond a doubt that he was oriented as to time and place, that he thoroughly understood the questions put to him and was able to give clear and intelligent answers. It is significant that Mr. Smith was able to "cooperate" in his own defense to the extent of fabricating a story which was consistent with much of the Government's case in chief and yet exculpated him. It was not until after Smith's story had been rejected by the jury and he had been found guilty that he chose to admit his participation [Rep. Tr. p. 585]. An examination of all his testimony, coupled with the fact that the trial judge had ample opportunity to observe the conduct

and demeanor of Smith throughout the trial, compels the conclusion that a hearing need not have been had on the motion brought under 28 U. S. C., Sec. 2255.

See:

United States v. Gundelfinger, supra.

At the very most the points urged in support of appellant's motion indicate that he may have been mentally unstable. However, this falls far short of even an indication that he was so mentally hampered as to be unable to understand the nature of the proceedings and cooperate in his own defense.

Lebron v. United States, 229 F. 2d 17 (C. A. D. C., 1955);

Higgins v. McGrath, supra.

See:

United States v. Cope, 144 Fed. Supp. 799 (U. S. D. C. W. D. Mo., 1956).

With respect to the allegation concerning Smith's history with the Veterans Administration, it is significant that at no time is it alleged that he was confined in an institution. This history indicates no more than that Smith might be emotionally unstable which, as noted above, does not approach that degree of impairment which renders one unable to stand trial. The argument which is advanced to the effect that this determination by the Veterans Administration created a presumption of "continued insanity" is wholly without merit since it is patently clear that the Veterans Administration was not addressing itself to the problem of whether or not Smith was competent to stand trial. Furthermore, that agency's action can in no way be considered a judicial determination.

(Compare: *Gunther v. United States, supra.*) So too, the fact that Smith is presently in a Federal Hospital at Springfield, Missouri is entitled to little weight since the reasons for transferring a prisoner to such a facility involve factors wholly different from those weighed in determining whether or not he was mentally competent to stand trial. With respect to the affidavit of Smith's wife in support of the motion for a reduction of sentence [Clk. Tr. pp. 90-91] little or no weight can be attributed to this document. (See *United States v. Cope, supra*). The affidavits submitted in connection with a request for issuance of subpoenas in no way support appellant's contention since the witness from the Veterans Administration was sought to establish Smith's *physical* incapacity to participate in the offense not his mental incapacity [Clk. Tr. p. 12]. Finally, the statement of appellant's counsel at the time of sentence actually supports the position now urged by the Government since counsel who had an opportunity to observe Smith closely catagorically stated Smith was sane [Rep. Tr. p. 586]. At the most counsel's remarks suggest that Smith was mentally or emotionally unstable—a condition which, as noted before, falls far short of rendering a person unable to stand trial. (See *Lebron v. United States, supra.*)

In summary the Government respectfully submits that Judge Carter who had ample opportuntiy to observe appellant during the trial, and particularly during his examination under oath, was entirely justified in concluding that Smith understood the nature of the proceedings against him and was able properly to assist in his defense. For this reason Judge Carter quite properly ruled that the allegations in appellant's motion did not require a full scale hearing under Section 2255 of Title 28, United States Code.

Conclusion.

For the foregoing reasons, it is respectfully submitted that the District Court's ruling denying appellant's motion without a hearing was entirely correct on the basis of the files and records in this cause.

Wherefore, appellee respectfully prays that the appeal be denied.

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